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James Cheap and others, Executors of the deceased } Appellants.
Thomas Cheap, Merchant in London,

Messrs. Aiton, Blackburn, and Colvile, Merchants } Respondents.
in Glasgow, - - - - -

The Respondents C A S E.

IN September, 1759, Thomas Cheap and Charles Adair, Merchants in London, entered into Partnership for the Purpose of dealing in Lawns, Cambricks, and all other Kinds of Linen Goods.

The Respondents were their Correspondents at Glasgow, and from Time to Time furnished them with Goods of the Manufacture of that Country; Adair was the acting Partner, and managed all the Correspondence of the Company.

In March, 1761, Cheap was employed by Government as one of the Commissioners in the Expedition against Bellisle, to which Place he then went with the Troops.

On the 26th of March, 1761, Adair wrote to the Respondents, under the Firm of his Company, and commissioned from them a large Quantity of Lawns. This Letter arrived at Glasgow on the 1st of April, when the Respondents having accepted of the Commission, returned an Answer by that Post, that the Goods ordered should be sent as soon as they could be got up from the Whitening Ground.

On the 21st of May, 1761, Adair, under the Firm of his Company, writes to the Respondents: "Gentlemen, We received the Favor of yours of the first of April, and observe the Contents.—As to Scotch Hollands or your Irish made Linens, we do not want any of them, nor think they would answer. We refer you to our Order of 26th March, and hopes daily to hear of these Lawns being on the Way for us. The following please send per first Opportunity by Land." Here follows a List of the Goods. "Please negotiate the inclosed Bill, and place to our Credit. We depend on your Care to charge these Goods on the lowest Terms you can, which will induce our further Orders. We are, Gentlemen, your most humble Servants, Adair and Cheap."

The Bill mentioned in the above Letter was drawn upon a Merchant in Allea, from whom the Respondents received Payment, and placed the Contents to the Credit of Adair and Cheap.

Thomas Cheap, the Partner of Adair, died at Bellisle in May, as the Respondents contend; but the Appellants alledge that his Death happened on the 26th of April, and that it was published in the News-Papers the 23d of May. But it is admitted that the Respondents never had any Notice thereof from Adair or any other Person whatsoever.

The Respondents having got ready Part of the Goods commissioned on 26th March, and all the Goods commissioned on 21st May, sent them from Glasgow on the 10th June, 1761; and of the same Date they, by Letter, advised Adair and Cheap of their having sent the Goods, and agreeable to the general Practice of the Respondents in like Cases, they transmitted an Invoice of the Goods, wrote on the same Sheet of Paper with the Letter, on Purpose to save Postage.

The Appellants, in the Course of these Proceedings, have exhibited an Invoice addressed to Charles Adair solely, but they have with-held the Letter though wrote on the same Sheet of Paper; and the Respondents, unfortunately for them in this Case, never keep Copies of their inland Correspondence, as the Shipmaster or Waggoner's Receipts are always sufficient Evidence of the Goods being sent. The Price of these Goods, being 242*l.* 14*s.* 9*d.* was immediately entered in the Respondents Books to the Debit of Adair and Cheap.

On the 22d of July, the Remainder of the Goods commissioned March 26, were sent off from Glasgow, being as early as they could be got up from the Whitening-Ground and dressed; and of the same Date they sent Invoice (Amount 41*l.* 9*s.* 10*d.*) and wrote Mr. Adair on the same Sheet of Paper; "Sir, Our last covered Account of Goods sent you the 10th ult. which hopes came safe to Hand, and to Content. Above you have Account of Lawns, which had not ready when your last Goods went.—Sent off this Day by Pickersgill and Co.'s Waggon, which we wish safe to Hand, and makes no Doubt of their pleasing. We shall be glad to receive your further Commands, &c."—And the Respondents also entered the Amount of these Goods in their Books to the Debit of Adair and Cheap.

Charles Adair wrote the Respondents, "Gentlemen, I should have acknowledged the Receipt of the Goods June 10, but waiting till I could compare them with some others I had coming. —Gauzes of all Sorts goes much out.—Your Draughts for these Parcels in June and July shall meet due Honour, as Bills on London fetches Par with you at 90 Days: So I expect you will draw accordingly, allowing for the Time already elapsed. I am obliged to Provost Aiton for his good Opinion of me, in recommending his Friend Mr. Robert Wilson. We could not agree on Terms—Time will show to whose Disadvantage. I am, &c. Charles Adair."

In May 1762, Charles Adair became Bankrupt. At this Time the Sum of 613*l.* 4*s.* 3*d.* was due by the Partnership of Adair and Cheap to the Respondents.—And in April 1763, they received a Dividend of 10 Shillings in the Pound (36*l.* 12*s.* 1*d.* $\frac{1}{2}$); and there remained due to them the like Sum with Interest. And as Mr. Cheap left a considerable Fortune to the Appellants, the Respondents never suspected they would have hesitated to discharge his Debts; but on the Demand being made, they alledged that they were not liable for the Value of the Goods commissioned on March 26 and May 21, Mr. Cheap having died before the Goods were sent to London.

The Respondents being unwilling to enter into a Law-Suit, proposed that the Matter should be settled by Arbitrators; to which the Appellants having agreed, the same was referred to an Arbiter; but by Means of the Appellants the Arbitration expired before any Award was made; whereupon the Respondents brought their Action against the Appellants, the Executors of Thomas Cheap, for Payment of the Balance of their Account with Interest.—Which having come before the Lord Ordinary, the following Interlocutor was pronounced: "The Lord Ordinary having considered the Memorials for the Parties, finds the Defenders (i. e. the Appellants) liable to pay the Pursuers (Respondents) the Price of the Goods commissioned on the 26th of March, 1761, and sent by them on the 10th of June thereafter. But finds that they are not liable for the Price of the Goods commissioned on the 21st of May, and sent by the Pursuers on the 2d of July said Year."

The Appellants having admitted that there was a Ballance due by them, the Respondents insisted to have a Decree for such acknowledged Ballance, and no Objection being made thereto on the Part of the Appellants, the Lord Ordinary by Interlocutor of this Date—"In respect no Objection was then made to what was craved, found the Defenders liable for said Ballance of 187*l.* 10*s.* 7*d.* and Interest of 184*l.* 10*s.* 7*d.* thereof, from July 19, 1761, till Payment."

Both

26 Nov. 1768.
3d Interlocutor
appealed from.

1 Dec. 1768.
4th Interlocutor
appealed from.

13 and 24 Dec.
1768.
5th & 6th Inter-
locutors ap-
pealed from.

Both Parties preferred Representations to his Lordship against the Interlocutor of July 5; when, upon considering the same with Answers, the following Interlocutor was pronounced: "Finds the Defenders liable to pay to the Pursuers the Price of the Goods commissioned on March 26, 1761, whether sent in June or July thereafter; but finds them liable in no Part of the Goods commissioned May 21, 1761." And of this Date, "Finds the Defenders liable for the Interest of the Price of the Goods commissioned March 26, 1761; and that from and after Year and Day after the Date of the Furnishings thereof, till Payment, and decerns."

Each of the Parties made two unsuccessful Applications to the Lord Ordinary, who adhered to his former Interlocutors.

The Appellants preferred a reclaiming Petition to the whole Court, praying, that they might not be found liable for the Goods commissioned on the 26th of March, 1761.—The Respondents put in Answers, to which they also added a Petition, praying, that the Court would confirm the Lord Ordinary's Interlocutor, so far as respected the Goods commissioned on March 26; and alter it so far as respected the Goods commissioned May 21, and find the Appellants liable for the Price thereof: To this Petition the Appellants put in Answers.

Appellants Ar-
gument.
Stair's Instit.
Lib. 1. Tit. 16.
C. 5.

Stair's Instit.
Lib. 1. Tit. 12.
§. 6.

The Arguments maintained by the Appellants, were in Substance, That by the Law of Scotland, Partnerships are *ipso facto* dissolved by the Death of either of the Partners: That a Partnership or Society is finished, First, When the Matter whereupon it is contracted is extinct: Secondly, By the Death or Incapacity of any of the Partners to act in the Society.—That a Mandate or Commission unexecuted, becomes void and annulled by the Death of either Party, Mandant or Mandator. Lord Stair in his Institutes of the Law of Scotland, writes: "It is implied in the Nature of a Mandate, that it is Personal, depending upon the singular Choice of the Mandant, which he hath made of the Mandator's Person; and therefore it is neither continued in the Heir of the Mandant, or of the Mandator; but *Morte Mandatoris perimitur Mandatum*; which holdeth also on the Death of the Mandator, for this Contract arising from a singular Affection or Friendship between both, the Removal of either dissolves that Tie." That with respect to the first Commission of March 26, though it was given when the Partnership of Adair and Cheap actually subsisted, yet as it was not executed till after the Dissolution of that Company, it must be void as to the Partnership, and only binding on Adair who received the Goods. That these Goods must have been sent by the Respondents from Glasgow after they had Notice of Cheap's Death, an Account of which was printed in all the Papers of the 23d of May; these are circulated over the whole Kingdom, and were in Glasgow the Evening of the 28th of May; and it is proved that the greatest Part of the Goods were not sent from thence till the 10th of June, and some of them not till July. The Invoice which accompanied them is in the Name of Charles Adair alone, and it is to be presumed that the Letter of Advice which accompanied the Invoice was addressed in the same Manner. That the Commission of May 21 was given after the Partnership was actually dissolved by the Death of Cheap—that the Respondents in like manner had Notice of it by the Publication in the News Papers the End of May, and they did not send off the Goods from their Warehouse till the 10th June.—That it is proved by Mr. Adair's Letter of August 23, that the Respondents knew of Mr. Cheap's Death, and that the Partnership was thereby dissolved, as early as the 10th of June, when they sent the first Parcel of Goods; for it appears that Mr. Aiton, one of the Respondents, did at that Time recommend his Friend, Mr. Wilson, as a Partner to Mr. Adair.

Respondents
Argument.

The Respondents maintained, that the *Contractus Societatis* of the Roman Law, as cited by the Appellants, is by no means applicable, and solely regards the Interest of the *Socii* or Partners themselves: That in the very Section of Stair's Institutes, quoted by the Appellants, follow these Words; Yet *propter Bonam Fidem, whatever is done with or by the Society before the Dissolution thereof be known, is valid.* The Law respecting Mandates, as quoted by the Appellants, is only applicable to Persons acting under Letters of Attorney, where one Person is authorized by another to act or appear for him; but the Respondents contended that the Commission given to them was of the Nature of a civil Contract, whereby one Party agreed to purchase and pay, and another to sell and deliver certain Articles of Merchandize. This Contract was complete, and binding upon the Representatives of each of the contracting Parties.—The Commission of March 26, was given and accepted of by the Respondents on the 1st of April, when it is admitted on all Hands that the Partnership of Adair and Cheap subsisted. The Respondents immediately set about preparing the Goods, and getting them finished agreeable to Adair and Cheap's Orders, and as soon as a Part of them were ready, they were sent off on the 10th of June, together with the whole Goods commissioned May 21, when the Respondents had no Knowledge of Mr. Cheap's Death: It is admitted that neither Mr. Adair nor the Appellants gave them Notice of it; and allowing that it was published in the News Papers at the Time mentioned, yet that cannot have the Effect of a Notification to the Respondents, especially as the Letter of the 21st of May running in the Name of both Adair and Cheap, gave them just Reason to suspect the Truth of the Paragraph in the Papers. That even if the Invoice of the 10th of June had been made out by the Respondents in the Name of Charles Adair, which they by no means admit, it would not have aided the Appellants; for as the Commission had been given by Adair and Cheap to the Respondents, and agreed to be executed by them to Adair and Cheap, it was not in the Power of either of the Parties to alter the Nature of the Contract, or by any subsequent Entry or Act to change the Nature of the Interest each Party had acquired therein. But the Respondents insist that it is their invariable Practice to write their inland Invoices and Letters on one Sheet of Paper.—That they followed this Practice on the 10th of June, respecting the Goods in Question. Yet the Appellants have produced an Invoice on a Slip of Paper by itself, which cannot be that transmitted by the Respondents, otherwise it would have had the Letter annexed of Date the 10th of June. That there is the more Room for Suspicion in this respect, as the Appellant, William Cheap, possessed himself of all Adair's Papers and Books after his Bankruptcy. That the Amount of the Goods is entered to the Debt of Adair and Cheap in the Respondents Books; and though they do admit that the Invoice and Letter of July 22, is addressed solely to Charles Adair, yet as there were part of the Goods contracted for as early as the 26th of March, that Circumstance cannot alter the Original Contract made with the Company.—They are entered in the Respondents Books at the Debit of the Company.—That though the Fact is disputed whether Cheap was alive or dead at the Time of the Commission, yet it is admitted on both sides, that it was before his Death was known to either Party.—The Respondents argued that such Commission was given by and accepted upon the Credit of the Company; that the Respondents immediately prepared themselves to answer it, and were so diligent and expeditious that all the Goods of that Commission were sent off by the 10th of June; and as this Purchase and Sale was made by both Parties, while they believed and understood the Company existed, it must necessarily bind all the Parties. That the Contents of the Bill remitted by Adair to the Respondents in his Letter of May 21, and afterwards received by them from a Merchant in Alloa, was placed to the Credit of Adair and Cheap; whereas if they had believed that Partnership to be dissolved, they would have put that Bill to the Credit of Adair alone, who remitted it.

The Appellants having all along argued and alledged, that by the written Contract of Copartnership between Adair and Cheap, it was specially provided, that the Company should be *ipso facto* dissolved by the Death of either Party; yet they have no Evidence in support of this Allegation: They never produced the Contract of Copartnership itself, and the Respondents are at full Liberty to contend the contrary, as the Evidence lies in the Hands of the Appellants, who had it in their Power to establish the Fact, by exhibiting the Contract; and as the Appellants, the Executors of Cheap, did not settle the Partnership Accounts with Adair for upwards of a Year after Cheap's Death, it is hence presumeable that the Company was not thereby dissolved.

If Adair had remained solvent, and had refused to communicate the Profit arising on the two Orders of the 26th March, and 21st May, to Cheap, or his Representatives; the Respondents contend, that he might have been compelled in a proper Action to account for such Profits; and the Orders given by himself in Name of the Company, would have been sufficient Evidence to have decided against him in Favour of Cheap or his Representatives; and whatever would have been sufficient between them, must be equally so between the present Parties.

With respect to the Paragraph quoted from Mr. Adair's Letter to the Respondents of the 25th August, referring to a Recommendation by Aiton, which the Appellants found on as Evidence of their Knowledge of Mr. Cheap's Death, construing the Letter as a Recommendation of one Wilson, to be taken by him into Partnership, the Respondents can by no means acquiesce in such a Construction of that Paragraph, the Words of which are: "I am obliged to Provost Aiton for his good Opinion of me in recommending his Friend Mr. Wilson.—We could not agree on Terms.—Time will shew to whose Disadvantage."—There is not a Word of his being a Partner. It may as reasonably be supposed he was hiring

hiring him as a Clerk; it might refer to a Bargain for Goods: The Hypothesis is equally credible one way as the other. It cannot be supposed that the Respondents would be so blind to their own Interest as to furnish the Goods on the Credit of *Adair* singly, when they could avail themselves of the Security of *Adair* and *Cheap*.—For if these Goods had been lost at Sea, or damaged in the Waggon, the Respondents must have sustained the total Loss, as they had no Orders from *Adair* to send him any Goods, the Commission being altogether in Name and for the behoof of the Partnership of *Adair* and *Cheap*. Had the Respondents ever doubted of the Subsistence of the Partnership, or that a Question could have arisen on the Company's being bound for the Goods commissioned in *March* and *May* and sent in *June* and *July*, they would, in Obedience to *Adair's* Letter of *August* 25, have drawn for the Amount of these Goods; whereas they made their Draughts for and on Account of Goods furnished at a more early Period to the Partnership of *Adair* and *Cheap*, respecting which there could be no Question.

2 March, 1769.
8th Interlocutor
appealed from.
The Court of Session of this Date, having considered the Reclaiming Petitions and Answers, “ adhered to the Lord Ordinary's Interlocutors reclaimed against, so far as they find the Defenders (Appellants) liable to pay the Pursuers *Aiton* and Company the Price of the Goods commissioned on the 26th of *March* 1761, with Interest from and after Year and Day after the Date of the furnishing thereof till Payment; and further found the Defenders (Appellants) liable also to pay to the Pursuers the Price of the Goods commissioned on the 21st of *May* 1761, with Interest from and after Year and Day after the Date of the furnishing till Payment, and decern.”

17 March, 1769.
8th Interlocutor
appealed from.
The Appellants reclaimed by Petition against the above Judgment; but the Court of this Date refused the Desire of the said Petition, and adhered to their former Interlocutor reclaimed against.

1 Feb. 1770.
9th Interlocutor
appealed from.
The Respondents afterwards insisted before the Lord Ordinary to be allowed their reasonable Costs in the Suit; when his Lordship “ Found the Defenders (Appellants) liable in the Expence of extracting the Decree, as the same should be certified by the Collector of the Clerks' Fees at extracting, and decerned, but found no other Expences due.”

21 Feb. 1770.
10th Interlocutor
appealed from.
The Respondents by a Representation prayed for their full Costs, but the Lord Ordinary “ refused the Desire thereof, and adhered.”

The Appellants were so well satisfied with the Justice of these Judgments, that they acquiesced in the same, and paid to the Respondents the several Sums decreed against them. Notwithstanding which they have now brought their Appeal to your Lordships, complaining of the Interlocutors of the Lord Ordinary of *July* 5, 1768, *August* 4, 1768, *November* 26, and *December* 1, 13 and 24, 1768; and of the Interlocutors of the whole Court of *March* 2 and 11, 1769; and of the Interlocutors of the Lord Ordinary of *February* 1 and 21, 1770, in so far as the Appellants are thereby found liable in Payment to the Respondents of the Price of either of the two Parcels of Goods furnished on *June* 10 and *July* 22, 1761; and for the Interest of the said Prices from Year and Day after the Goods were furnished, and for the Expences of extracting the Decree; praying that the same may be reversed, varied or altered. But the Respondents humbly hope that the same will be affirmed, and the Appeal dismissed with Costs, for the following, or other

R E A S O N S.

I. The Commission of *March* 26 was given by *Adair* and *Cheap*, and accepted of by the Respondents on *April* 1, 1761, when it is admitted on both Sides that the Partnership of *Adair* and *Cheap* actually subsisted; a mutual Obligation thence arose, whereby the Respondents bound themselves to furnish *Adair* and *Cheap* with a certain Quantity and Species of Goods; and they on their Part were bound to pay the Respondents the Price or Value thereof. The Commission of *May* 21 being given in the Name, and accepted upon the Credit of *Adair* and *Cheap* while the Company legally existed, and under the Belief of all the Parties being alive, it must have the same Operation and be equally binding as the other.

II. The Respondents having accepted these Commissions, set immediately about executing them in the Manner directed by *Adair* and *Cheap*. The first Commission employed a considerable Space of Time; took up much Attention, and required great Labour. The Goods ordered on the 21st of *May*, were so expeditiously got ready, that all of these, together with great Part of the former Order, were sent from *Glasgow* on the 10th of *June*; and the Remainder, on the 22d of *July*, as soon as they were got up from the Whitening Ground and dressed. This Execution of the Commission on the Part of the Respondents, gives them a perfect Right against those under whose Authority it was given, and upon whose Credit it was accepted, for Satisfaction of the Debt thereby incurred. Neither Party had it in their Power to recede from the Agreement; they were mutually bound to perform their respective Obligations; and on the Death of any of them, the Representatives of the deceased, were bound to perform his Part of the Contract.

Objection. The Appellants object, that by the Death of *Cheap* the Partnership itself was determined, both on the general Principles of Law, and by express Provision in the written Articles; and that, as soon as this Event came to the Knowledge of the Respondents, it made an End of the Commission. They insist that the Respondents knew the Death of *Cheap* before the Goods were sent; that they were sent, therefore, on the Credit of *Adair* alone; in Proof of which, they alledge that the Invoice was in his Name singly, instead of the Name of the Partnership.

Answer. The Respondents submit it to be clear, in Point of Law, that the Commission, being given and accepted, and moreover in part executed, whilst the Partnership was in Force, remained good, notwithstanding the Death of one of the Partners, as to the Persons authorised by it, not only against the surviving Partner, but also against the Representatives of the deceased; and that nothing in the Articles (which they do not admit to contain any such Clause of Dissolution, the Instrument not being produced in Proof of the Allegation) could vary the Law in this respect with regard to the Creditors of the Partnership. They deny that they had any certain Intimation of *Cheap's* Death at the Time of sending the Goods; and insist, that even if it had been notified to them in the regular Manner, it would not have affected their Demand against his Representatives, in consequence of the Commission given whilst the Partnership was in Force, and then so far advanced in the Execution.

E. THURLOW.
THO. LOCKHART.

Die Veneris 11. Decem. 1772.

Ordered and Adjdg'd That the aforesaid Interlog^r of the Lord Ordinary of the 4th of August 1768 and so much of the subsequent Interlog^r as adhere to the same be and the same are hereby Affirm'd and that the whole other Interlog^r as well of the Lord Ordinary as of the whole Lords of Session in so far as respects the other Points in the Cause be and the same are hereby Revers'd: Reserving to the Respond^t the said *Aiton* and Company their Relief and all Claims

and Demands competent to them from or out of the Estate of Charles Adair in the said Petition of Appeal mentioned.

James Cheap, and others;

Appellants.

Messrs. Aiton and Company,

Respondents.

The Respondents CASE.

To be heard at the Bar of the House of Lords, on

Friday the 11th Day of December, 1772.

THE LOCKHART.
T. THURLOW.